

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SEVEN**

THE DAVEY TREE EXPERT COMPANY

Employer

and

Case 07-RC-152789

**LOCAL 876, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS (IBEW), AFL-CIO**

Petitioner

APPEARANCES:

Carl J. Gluek, Attorney, of Cleveland, Ohio, for the Employer
Fillipe S. Iorio, Attorney, of Grand Rapids, Michigan, for the Petitioner

DECISION AND DIRECTION OF ELECTION

The parties agree that an appropriate unit will include employees in the following job classifications: All full-time and regular part-time A crew forepersons, B crew forepersons, A tree trimmers (journeypersons), B tree trimmers, C tree trimmers, D tree trimmers, Ground persons, Run truck operators, Service truck operators, Mower operators, and Side trimmer operators working for the Davey Tree Expert Company on the Consumers Energy and Homeworks Tri-County Electrical Cooperative contracts in the State of Michigan, excluding all other employees, office clerical employees, professional employees, and guards and supervisors as defined in the Act.

The only issue presented in this case is whether the election should be conducted by a mixed manual/mail ballot method or straight mail ballot. Election arrangements, including the voting method, are not matters within the scope of a pre-election hearing. Accordingly, although the hearing officer permitted the parties to state their positions at the hearing, the parties were not permitted to present evidence on this issue.

The Employer employs approximately 175 unit employees¹ performing tree maintenance clearing services around utility lines for customers including Consumers Energy in the State of Michigan. The Employer conducts its operations in approximately 20 different counties throughout Michigan, with employees' work sites ranging from the cities of Lansing to Flint, north to West Branch and to Grayling. The Employer which has no facility in the State of Michigan, asserts its employees work many miles from their homes in many counties throughout

¹ The Employer indicated it had approximately 161 unit employees working for its customer Consumers Energy, and 14 or 15 working for Homeworks Tri-County Electric Cooperative. (Tr 27)

Michigan. The Employer's operations require all employees to report to "pull out" locations each morning and afternoon to start and finish their work day. The "pull out" locations are typically parking lots located in areas around the State. Employees pick up their tools, work vehicles, and get their work assignments at the beginning of their work day, and then return to the "pull out" location at the end of the work day to get instructions for their next work assignment. The Employer asserts that there are approximately nine pull out locations for their Consumer Energy account: two in the Flint area, two in Saginaw, and two in the Lansing/Alma area. As the Employer's work sites move, the "pull out" locations can change. Employees are advised orally by their supervisor if a "pull out" location is changing.

The Employer's ultimate position is that a mixed manual and mail ballot election is appropriate, indicating that a manual ballot could be conducted in Saginaw, Flint and Lansing, where six of its "pull out" locations are located, and that the remaining employees not assigned to those "pull outs" vote by mail ballot. The Employer concedes that its employees' work is scattered throughout the State, but that a manual ballot is appropriate for its employees who report to the six "pull out" locations because the employees meet in common areas ("pull outs") at the beginning and end of each work day, and their work schedules are the same. The Employer adds that there is no strike, picketing or lockout at this time, and that utilizing a straight mail ballot election for agency budgetary concerns is not appropriate under any circumstance, especially when a manual ballot will eliminate fraud and coercion in the voting process. Finally, the Employer asserts that predetermined "pull out" locations will alleviate any concerns regarding exigent circumstances, such as inclement weather that creates unforeseen work that could disrupt a manual ballot election.

Petitioner makes several arguments in support of a mail ballot election. First, a mail ballot election is appropriate in this case under the holding in *San Diego Gas & Electric*, 325 NLRB 1143 (1998), as well as the guidance given in the NLRB Casehandling Manual, Section 11301. Second, the type of employee work force and the work performed supports a mail ballot election. In the record, Petitioner asserts that the employees in question are scattered over a wide geographic area encompassing anywhere from 16 to 20 different counties in the State, and most work in small crews of two to three employees. Third, employees report to between 13 to 15 different "pull out" locations in total—and such "pull outs" are inappropriate election sites in that they often amount to nothing more than a parking lot or the space behind a gas station. Moreover, the employees remain at the "pull out" locations for just a short period time—to receive their work assignments—before dispersing to various locations in the field. Fourth, the Petitioner contends that the "pull out" locations change as the work assignments change, noting that this transient aspect of the work is affected by circumstances beyond the control of employees. For example, should a major storm occur within days of, or on the day of the election, employees could be prevented from voting because of the possibility that they could be dispatched to perform work either out of state or in different counties. Fifth, a major storm could also prevent employees who live distances greater than 20 miles or so from reaching a polling station. Sixth, the employees in question do not necessarily live in the counties where they work and many of them carpool. Those employees who do rely on others for transportation should not have their right to cast a ballot dependant upon their ability to secure a ride to any polling location on a given day. Seventh, although the Employer has proposed manual ballot polling locations in Flint, Saginaw and Lansing, it failed to identify a specific location at which the

Board would conduct a manual ballot election, hence employees may be required to drive miles from their “pull out” areas just to reach a polling location. Eighth, it is not certain how the Employer determined which 60 employees would be eligible for the mail ballot outside of those defined as North or West Branch employees and that the Employer has drawn an arbitrary line that seeks to disenfranchise a large portion of the employees. Ninth, a mail ballot election is economically more prudent than a manual election, which would require securing facilities and assigning Board agents for polling times. Finally, the Employer’s contention that there might be fraud or coercion in a mail ballot is not supported by any evidence.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.²
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The parties disagree as to whether to conduct a mixed manual/mail-ballot or a full mail-ballot election. Pursuant to its longstanding practice, the Board has left determinations regarding the method of balloting to the discretion of the Regional Director. *2 Sisters Food Group, Inc.*, 357 NLRB No. 168, slip op. at 4-5 (2011); *Halliburton Services*, 265 NLRB 1154, 1155-1156 (1982); *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367-1368 (1954). See also NLRB Casehandling Manual (Part Two), Representation Proceedings Sections 11301 – 11350.

For the reasons articulated by the Petitioner, I have determined that a secret mail ballot election is appropriate in this case. While acknowledging that fraud and coercion are concerns in any election, and that a manual ballot is the preferred Board method, a mail ballot under these circumstances alleviates the risks associated with specific date and time (partial) manual election restrictions by eliminating the possibility that employees will be denied the opportunity to vote due, in part and as noted above, to an unforeseeable deployment caused by an exigent circumstance.

² The Employer, an Ohio corporation with offices and a place of business located in Kent, Ohio, is engaged in the business of providing residential and commercial tree services and landscape service throughout North America. During the 2014 calendar year, a representative period, the Employer provided services valued in excess of \$50,000 directly to Consumers Energy at locations in the State of Michigan.

In view of the foregoing and the record as a whole, I find the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time A crew forepersons, B crew forepersons, A tree trimmers (journeypersons), B tree trimmers, C tree trimmers, D tree trimmers, Ground persons, Run truck operators, Service truck operators, Mower operators, and Side trimmer operators working for the Davey Tree Expert Company on the Consumers Energy and Homeworks Tri-County Electrical Cooperative contracts in the State of Michigan, and excluding all other employees, office clerical employees, professional employees, and guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret mail ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Local 876, International Brotherhood of Electrical Workers (IBEW), AFL-CIO.

A. Election Details

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At 4:15 p.m. on June 19, 2015, ballots will be mailed to voters from the National Labor Relations Board, Region 7 Office, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by June 26, 2015, should communicate immediately with the National Labor Relations Board by either calling the Region 7 Resident Office at (616) 456-2679 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

All ballots will be commingled and counted at the National Labor Relations Board, Region 7 Resident Office, 110 Michigan St. NW, Room 299, Grand Rapids, Michigan 49503 on July 10, 2015, at 11:00 a.m. In order to be valid and counted, the returned ballots must be received in the Region 7 Resident office, prior to the counting of the ballots.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending May 30, 2015, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such

strike who have retained their status as strikers, but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **June 10, 2015**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1099 14th Street NW, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated at Detroit, Michigan, this 8th day of July, 2015.

/s/ Terry Morgan

Terry Morgan, Regional Director
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